

No. 31891-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CORY DALE CUNNINGHAM,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 03-1-03536-1
The Honorable James R. Orlando, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

The State failed to meet its burden of proving beyond a reasonable doubt every essential element of the crime.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

Where the evidence established that Appellant acted within his legal rights during the incident, and that Appellant did not breach any legal duty, did the State fail to prove beyond a reasonable doubt that Appellant's actions were negligent and fell below the standard of care of a reasonable person?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Cory Cunningham by Information with one count of premeditated first degree murder, in violation of RCW 9A.32.030(1)(a). (CP 1) The State also alleged that Cunningham was armed with a deadly weapon during the commission of the crime. (CP 1)

The jury found Cunningham guilty of the lesser-included offense of second degree manslaughter, and entered a deadly weapon special verdict. (CP 76-80; RP 496-97) The trial court

sentenced Cunningham within his standard range to 87 months of confinement. (CP 100, 103; RP 515, 524) This appeal follows. (CP 116)

B. SUBSTANTIVE FACTS

Cory Cunningham lives in a mobile home in the Spanaway Mobile Home Park. (RP 367) His friend Richelle Nichols and her four children, had been kicked out of several homeless shelters, and were living in their car. (RP 168, 244, 368) Cunningham found out, and told Richelle that she and her children could stay with him until they got back on their feet. (RP 168, 368)

Nichols had a friend named Jason Radach. (RP 172) The first time Nichols brought Radach to Cunningham's home, Cunningham got angry and asked him to leave. (RP 370) A few weeks before the charged incident, Nichols brought Radach to Cunningham's home a second time, without Cunningham's permission, so that they could smoke methamphetamine together. (RP 173-74, 370) When Cunningham discovered that Radach was there, he got angry and told Radach to leave. (RP 174-75, 370) Cunningham got a sword, pointed it at Radach, and told him to get out of the home. (RP 175, 370) Radach left but, according to Cunningham, he was belligerent and threatened to beat up

Cunningham if they met again. (RP 371) Cunningham also told Nichols to leave, but later changed his mind and told her she could stay. (RP 176)

The night of August 2nd to 3rd, 2003, Nichols went out with another friend named Philip Campbell. (RP 176-77, 29, 104) While they were out, they ran into Radach, and they all went back to Cunningham's home. (RP 177-79) When they got there, Radach went into Nichols' bedroom and lay down, but no one told Cunningham that he was there, and no one asked Cunningham's permission for Radach to be there. (RP 180, 197-98) Nichols and Campbell smoked methamphetamine together. (RP 181)

Later, Cunningham came into the room and discovered Radach sleeping on the bed. (RP 181-82) According to Nichols, Cunningham began hitting Radach on the head and told him to "get the fuck out of the house." (RP 182-83) Nichols testified that Radach tried to leave the bedroom, but Cunningham knocked over a dresser, which blocked Radach's exit. (RP 183) According to Nichols, Cunningham said "You are dead, Mother Fucker, I am going to kill you. I can guarantee you are dead." (RP 183) However, according to Cunningham, Radach and Nichols began hitting him first, and he pushed the dresser over so that they could

not follow him out the door. (RP 372) Cunningham also saw Radach put a can into a plastic bag and wrap the bag around his hand, to possibly use as a weapon. (RP 372)

Both parties testified that Cunningham then left the room, and that Nichols and Radach started to leave. (RP 183, 372, 374) As they were walking towards the door, Cunningham came out to the living room holding a sword in his hand.¹ (RP 184-85, 372) Cunningham told them to get out. (RP 374) Although Radach was about two feet from the open door, he did not leave. (RP 374) Instead Radach swung a black bag and hit Cunningham in the head. (RP 127, 185, 306, 320-21, 351, 375)

According to Nichols, Radach and Cunningham then went “head-to-head.” (RP 186) She saw that Cunningham was holding the sword down. (RP 186) Nichols ran outside and yelled for someone to call 911, so she did not see what happened next. (RP 187, 197) When she came back into the home, she saw that Radach had been stabbed, and heard him say “please stop.” (RP 187) She saw that Radach had a hand on the sword, and saw him fall to the ground as the sword came out of his chest. (RP 188, 191)

Nichols' son, Joey Salgado, who also witnessed the incident, testified that he awoke to the sound of Radach and Cunningham yelling at each other. (RP 233) He heard Cunningham tell Radach and Nichols to get out. (RP 234) He testified that he heard Cunningham tell Radach that he was going to kill him. (RP 234) He saw Radach and Nichols come to the living room to gather their belongings, and saw Cunningham walk out, holding a sword down at his side. (RP 235) He saw Cunningham lift the sword, and saw Radach grab it and try to take it from Cunningham. (RP 236, 237) He saw Radach and Cunningham struggling, so he jumped on Cunningham's back and started hitting him and yelling at him to stop. (RP 241)

Salgado did not see the sword go into Radach's body, but he heard Radach tell Cunningham that he was bleeding and heard him ask Cunningham to stop. (RP 237) Salgado testified that Radach and Cunningham were crouched down, and that Cunningham stood up and Radach fell to the ground and the sword came out. (RP 238) Salgado heard Cunningham say "Oh my God, look what I did" and "I didn't mean to." (RP 242) Cunningham was upset, and helped carry Radach to Nichols' car. Salgado testified that he did

¹ Testimony at trial established that the sword was 24 inches long. (RP 75)

not think Cunningham intentionally tried to stab Radach. (RP 254)

Christopher Bender and Kory Okerson were also present at the home when the incident occurred.² (RP 299) Bender heard Radach and Cunningham yelling at each other, and heard Cunningham yell “I’m going to kill you.” (RP 304, 305) He saw Cunningham come out to the living room holding a sword, and heard him tell Radach to get out. (RP 306) Bender testified that Radach was close to the open door, and nothing prevented him from walking out. (RP 320) But instead of leaving, Radach swung a bag and hit Cunningham in the face. (RP 306, 320-21)

He testified that Radach and Cunningham went towards each other, and Cunningham put Radach in a head-lock while Radach grabbed onto Cunningham’s hair. (RP 308) He could hear Cunningham saying “let go of my hair.” (RP 308) Bender could not see the sword, but heard Radach say “I am bleeding”, and he saw blood on the floor. (RP 310) Bender testified that Cunningham appeared upset that Radach had been stabbed. (RP 325) He also testified that Radach did not seem afraid of Cunningham during the entire incident. (RP 330)

² Bender, who was 19 years old, and Okerson, who was 14 years old, did not have a place to stay that night, so Cunningham let them stay with him. (RP 116, 118, 297, 299, 301)

Okerson testified that Radach and Nichols came into the living room, followed by Cunningham, who was holding a sword. (RP 127) Okerson testified that Cunningham did not move towards Radach, but that Radach initiated the altercation by swinging a bag and hitting Cunningham in the face. (RP 127, 145, 154) He saw them start to wrestle, and saw Radach grab the sword with his left hand and grab Cunningham's hair with his right hand. (RP 135, 148) He saw Cunningham put Radach in a head-lock, and heard Cunningham say "[l]et go of my hair." (RP 148)

Campbell also testified, and told the court that he saw Nichols sneak Radach into the house without telling Cunningham. (RP 348) He testified that Cunningham discovered Radach, and told him to get out. (RP 350, 352) Just before the altercation started, Radach was closest to the open door, and could have walked out. (RP 352) Instead, Radach hit Cunningham in the face with the bag, then they started wrestling. (RP 351, 353) He testified that Radach was the aggressor. (RP 353)

Cunningham testified that he was looking away when Radach hit him in the head. (RP 375) He was stunned and fell to the ground. (RP 375) He saw that Radach was coming towards him, so he put his hands up to protect himself, and that is how the

sword was raised up and ended up being pointed towards Radach. (RP 375) Radach and Cunningham began wrestling, and Radach pulled his hair and tried to take the sword. (RP 375-76) Cunningham was not sure how Radach got stabbed, but he probably ran into the sword. (RP 375) Cunningham testified that he did not swing the sword at Radach, and he did not try to stab Radach with the sword. (RP 375, 377) Cunningham was scared of Radach, and thought his life might be in danger. (RP 381) He did not let go of the sword, because he thought Radach would take it and use it against him. (RP 381-82)

After the altercation, Cunningham and Bender carried Radach to Nichols' car, and Nichols left for the hospital. (RP 193, 377) Radach died before he reached the hospital. (RP 33, 49) Radach suffered two stab wounds to the chest, and had several "defensive" wounds on his left hand. (RP 264-66)

III. ARGUMENT & AUTHORITIES

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to

support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

At the State’s request, the trial court instructed the jury on the charged offense, first degree premeditated murder, and also on the lesser offenses of second degree murder, first degree manslaughter, and second degree manslaughter.³ (RP 419; CP 50-64) The jury convicted Cunningham of second degree manslaughter. (CP 79; RP 497)

First, by finding Cunningham not guilty of first and second degree murder, the jury clearly rejected the State’s position that Cunningham intentionally caused Radach’s death. See *State v. Schoel*, 54 Wn.2d 388, 394, 341 P.2d 481 (1959) (the jury verdict

³ First degree murder requires the defendant to act with premeditated intent to cause the death of the victim. RCW 9A.32.030(1)(a). Second degree murder requires the defendant to act with intent to cause the death of the victim. RCW 9A.32.050(1)(a). First degree manslaughter requires the defendant to recklessly cause the death of the victim. RCW 9A.32.060(1)(a). Second degree manslaughter requires the defendant to negligently cause the death of another person. RCW 9A.32.070.

on a lesser offense necessarily constitutes an acquittal on the greater); RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a). Second, to find Cunningham guilty of first degree manslaughter, the jury would have had to find that he knew his actions might result in Radach being stabbed, and that he disregarded this risk. RCW 9A.32.060(1)(a); RCW 9A.08.010(1)(c). Accordingly, the jury's rejection of first degree manslaughter means that the jury did not believe that Cunningham knew that Radach might be stabbed during the altercation. See *Schoel*, 54 Wn.2d at 394.

By finding Cunningham guilty of second degree manslaughter, the jury believed that Cunningham acted "with criminal negligence" and thereby "caused the death of" Radach. RCW 9A.32.070; WPIC 28.06. Criminal negligence is defined as when a person "fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(d); WPIC 10.04. Accordingly, the jury believed that Cunningham was not, but should have been, aware that his actions could result in Radach being stabbed, and that a reasonable person would have acted differently.

The question is whether the State's evidence establishes beyond a reasonable doubt that Cunningham acted negligently when he either obtained the sword, threatened Radach with the sword, or failed to drop the sword after Radach hit him, charged him, or grabbed the sword himself. The State must prove that a reasonable person in Cunningham's position would have known that a stabbing could occur, and would have acted differently. RCW 9A.08.010(1)(d). The State did not meet this burden, because every action taken by Cunningham was within his legal rights, and therefore he acted as any reasonable person would have acted under the same circumstances.

It is completely lawful for Cunningham to "use, attempt, or offer to use force upon or toward the person of another" when "preventing or attempting to prevent . . . a malicious trespass[.]" RCW 9A.16.020(3). The evidence established that the mobile home belonged to Cunningham. (RP 169, 367) The evidence established that Radach was an uninvited guest, he had been told to leave the premises several times in the past, and that he was told to leave again on this occasion. (RP 175, 348, 352) Radach snuck into Cunningham's home even though he knew he was not wanted or invited. (RP 197-98, 348) Radach was trespassing in

Cunningham's home, and Cunningham had every legal right to threaten to use force against Radach in order to make him leave. RCW 9A.16.020(3).⁴ Accordingly, the act of obtaining the sword cannot be considered negligent.

The law also provides that it is not unlawful for Cunningham to "use, attempt, or offer to use force upon or toward the person of another" when "preventing or attempting to prevent an offense against his or her person[.]" RCW 9A.16.020(3). Furthermore, "[i]t is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack The law does not impose a duty to retreat." WPIC 16.08; see *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984) (one has no duty to retreat when assaulted where one has the right to be present). Accordingly, Cunningham had no legal duty to drop the sword or retreat from his living room or his home after Radach refused to leave and instead hit Cunningham with the bag. In fact, he had every legal right to stand and defend himself. Cunningham acted within his legal rights and did not breach any legal duty.

Finally, when Radach refused to leave but instead engaged

⁴ "A person is guilty of criminal trespass in the first degree if he knowingly enters

Cunningham in a physical altercation, and possibly grabbed for Cunningham's sword, Cunningham still had no legal duty to retreat and no legal duty to drop the sword. Radach was still trespassing in Cunningham's home, and was in the process of committing an assault against Cunningham. Cunningham had every right to stand his ground.

The State did not establish that Cunningham took any actions that are not allowed by law, and that are not within his rights as a homeowner and individual. Cunningham had a right to arm himself when he discovered Radach trespassing in his home, he had every right to stand his ground and defend himself when Radach refused to leave and instead assaulted Cunningham, and Cunningham had no duty to retreat when Radach still refused to leave and instead engaged in a wrestling match with Cunningham. The State therefore failed to prove that Cunningham acted negligently.

IV. CONCLUSION

Cunningham acted lawfully at every stage of the incident and did not breach any legal duties. Cunningham did not act in a manner below the standard of care of a reasonable person, and the

or remains unlawfully in a building." RCW 9A.52.070(1).

State therefore did not establish that he acted negligently. Accordingly, Cunningham's conviction and weapon enhancement must be reversed and dismissed with prejudice.

DATED: January 14, 2005

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on January 14, 2005, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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